A **SHARIKAT PERMODALAN KEBANGSAAN BHD**

v.

JALINAN WAJA SDN BHD

B HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[CIVIL SUIT NO: S-23-21-2009]
27 SEPTEMBER 2010

C ***CIVIL PROCEDURE:*** *Amendment - Writ - Defamation - Application to amend writ of summons to include indorsement - Rules of the High Court 1980, O. 78 r. 2- Whether writ defective for non compliance - Effect of non-compliance - Whether curable - Rules of the High Court 1980, O. 2 r. 1(1) - Whether issues raised in earlier injunction*
D *application heard and dismissed - Whether res judicata can be invoked to disallow application for amendment*

CIVIL PROCEDURE: *Amendment - Writ - Defamation - Application to amend writ of summons to include indorsement - Rules of*
E *the High Court 1980, O. 78 r. 2 - Whether application made is not bona fide and prejudicial to defendant - Whether issues raised in earlier injunction application heard and dismissed - Whether res judicata can be invoked to disallow application for amendment*

CIVIL PROCEDURE: *Irregularity - Effect of non-compliance -*
F *Whether curable - Rules of the High Court 1980, O. 2 r. 1*

CIVIL PROCEDURE: *Judgment - Res Judicata - Whether issues raised in earlier injunction application heard and dismissed - Whether res judicata can be invoked to disallow application for amendment*

G The plaintiff had commenced an action for defamation with respect to certain paragraphs in three letters sent by the defendant to third parties. The writ was filed on 6 April 2009 together with a statement of claim setting out in various paragraphs the impugned
H words. The defendant filed their defence on 8 May 2009 alleging that the words referred to were not defamatory of the plaintiff, that there was no malice and that the letters were sent with the intention of safeguarding the rights and interests of the defendant. The plaintiff proceeded on 9 June 2009 to file an application for
I an injunction to restrain the defendant from further publishing the impugned words wherein the learned Judicial Commissioner had

dismissed the said application because the impugned words were not defamatory and because the writ of summons did not contain the indorsement required under O. 78 r. 2 of the Rules of the High Court 1980 (RHC) and hence was defective. The plaintiff then proceeded to file an application on 12 November 2009 to amend the writ of summons to include the indorsement referred to in O. 78 r. 2 RHC. However, this application was objected by the defendant on grounds that (i) O. 78 r. 2 RHC with respect to the indorsement in the writ was a mandatory requirement and that non-compliance with it was fatal (ii) *Res judicata* had set in as the learned Judicial Commissioner who heard the application for the injunction had stated that the words were not defamatory and that the writ in any event was defective for non compliance with O. 78 r. 2 RHC and (iii) the application to amend was not made *bona fide* and would prejudice the defendant. The learned Registrar dismissed with costs the application to amend the writ of summons and hence the appellant/plaintiff appealed against the said decision.

Held (allowing the appeal):

(1) The impugned words had been sufficiently set out in the statement of claim. Indeed the writ was indorsed with the statement of claim filed and there was no prejudice caused to the defendant who could identify with sufficient particularization the publications. The defendant had no difficulty filing the defence and taking part fully in the plaintiff's application for an injunction by opposing it with several affidavits filed. (para 17)

(2) It would have been different if the plaintiff were to file just a writ with no statement of claim accompanying it or not together with the statement of claim. Where a statement of claim was filed together with the writ there was little additional purpose to have the full particulars of the impugned publication reproduced again in the indorsement because the whole statement of claim was the indorsement. The non-indorsement referred to was at most only an irregularity which could be rectified. The non-compliance must be that which was an accidental omission or oversight, an inadvertent infraction that does no injury to anyone. (O. 2 r. 1 RHC) (paras 18-20)

(3) There was nothing to show that the amendments applied for would have prejudiced the defendant in any way or that it had not been made *bona fide (Yamaha Motor Co. Ltd v. Yamaha Malaysia Sdn Bhd)* (paras 40)

(4) A judge hearing an application may say in passing why the plaintiff's injunction was not granted as perhaps that the words were on the face of it not defamatory or that the Writ here without the statement as stipulated in O. 78 r. 2 RHC was defective. These were merely obiter remarks and not the ratio of the case. Besides, these were not matters that had particularly proceeded for precise pronouncement by the court. Anything said in the process that did not come within that parameter was said only by way of passing and it would not prejudice a party from putting in an application that called for a full and focused finding and determination. (para 43)

[Plaintiff's application for amendment allowed since it had not prejudiced the defendant and was made bona fide. Appeal allowed with costs in the cause.]

Case(s) referred to:

Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 ***(refd)***

Bumiputra-Commerce Bank Bhd & Ors v. Bumi Warna Indah Sdn Bhd [2004] 4 CLJ 825 ***(refd)***

Cropper v. Smith [1883] 26 Ch D 700 ***(refd)***

Dato' Tan Heng Chew v. Tan Kim Hor & Ors [2008] 7 CLJ 776 ***(refd)***

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 ***(refd)***

GL Baker Ltd v. Medway Building And Supplies Ltd [1958] 1 WLR 1216 ***(refd)***

Golden Vale Golf Range & Country Club v. Hong Huat Enterprise Sdn Bhd [1998] 3 CLJ 35 ***(refd)***

Kettemen & Ors Hansel Properties Ltd & Ors [1987] 1 AC 189 ***(refd)***

Koperasi Belia Nasional Bhd v. Storage Enterprise (Port Kelang) Sdn Bhd [1998] 3 CLJ 335 ***(refd)***

Kuala Lumpur Finance Berhad v. KGV & Associates Sdn Bhd [1995] 1 CLJ 519 HC ***(refd)***

Muniandy Subrayan & Ors v. Chairman And Board Members, Koperasi Menara Maju Bhd [1997] 1 CLJ 417 CA ***(refd)***

Shahidan Shafie v. Atlan Holdings Bhd & Anor & Another Appeal [2005] 3 CLJ 793 ***(refd)***

Skrine & Co v. MBf Capital Bhd & Anor & Other Appeals [1998] 3 CLJ 432 ***(refd)***
Tetuan Tanjung Teras & Ors v. Tetuan Syn Tai Hung Trading Sdn Bhd [2003] 7 CLJ 124 HC ***(refd)***
The Pacific Bank Bhd v. Chan Peng Leong [1998] 2 CLJ 440 ***(refd)***
United Asian Bank Bhd v. Pushpamani Shanmugam [1983] 2 CLJ 148; [1983] CLJ (Rep) 920 HC ***(refd)***
Wan Daud Wan Jusoh v. Mohamed Haji Ali & Anor; Daud Jusoh v. Annuar Haji Musa & Anor; Mohd Nor Ismail v. Mohd Zain Abdullah & Anor [1988] 2 MLJ 384 ***(refd)***
Watinah Mad Kartam v. Dr. KS Sarvananthar [2009] 1 LNS 782 ***(refd)***
Wong Ah Hee @ Wong Ah Mooi & Anor v. Low Tuck Hoong [1994] 2 CLJ 313 ***(refd)***
Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 1A, O. 2 rr. 1, 2(1), O. 6 r. 2(1)(a), O. 18 r. 1, O. 32 r. 13(2)(b), O. 78 r. 2
Rules of the Supreme Court 1957, O. 2 r. 1, O. 3 rr. 1, 2, 3, 6(1), (2), 9

For the applicant/plaintiff - Sunther Thulasi (Ahmad Amir with him); M/s Affendi Zahari
For the respondent/defendant - Edynoor Hiefnee (Nurzali Mohd Taib with him); M/s Hisham Sobri & Kadir

Reported by Kumitha Abdul Majid

JUDGMENT

Lee Swee Seng JC:

Preliminaries

[1] The plaintiff had commenced an action for defamation with respect to the certain paragraphs in three letters sent by the defendant to third parties. The writ was filed on 6 April 2009 together with a statement of claim setting out in various paragraphs the impugned words.

[2] The defendant had no difficulty filing their defence and indeed did so on 8 May 2009. The defence basically is that the words referred to are not defamatory of the plaintiff and that there

was no malice and the letters were sent with the intention of safeguarding the rights and interests of the defendants. The plaintiff then on 9 June 2009 filed its reply to the defence.

Problem

[3] The plaintiff proceeded on 9 June 2009 to file an application for an injunction to restrain the defendant from further publishing the impugned words. The learned Judicial Commissioner that heard the application dismissed it and gave as her reasons for so doing that the impugned words are not defamatory, that the writ of summons did not contain the indorsement required under O. 78 r. 2 of the Rules of the High Court 1980 (RHC) and hence was defective.

Prayer

[4] Acting on an abundance of caution, the plaintiff proceeded to file an application on 12 November 2009 to amend the writ of summons dated 6 April 2009 to include the indorsement referred to in O. 78 r. 2 RHC though its counsel had labored under the understanding that where a writ is filed with a statement of claim setting out the full details of the impugned paragraphs in the three letters, that is tantamount to a writ indorsed with a statement of claim. Indeed the defendant was not prejudiced at all and indeed had no difficulty filing its defence.

However this application was objected to by the defendants on grounds that:

1. Order 78 r. 2 RHC with respect to the indorsement in the writ is a mandatory requirement and that non-compliance with it is fatal;

2. *Res judicata* has set in as the learned Judicial Commissioner who heard the application for the injunction had stated that the words are not defamatory and that the writ in any event is defective for non-compliance with O. 78 r. 2 RHC;

3. The application to amend was not made *bona fide* and would prejudice the defendant.

[5] The learned Registrar dismissed with costs the application to amend the writ of summons and hence this appeal by the appellant/plaintiff before me.

Principles

Whether Non-compliance With O. 78 r. 2 RHC Is Curable?

[6] Order 78 r. 2 RHC provides:

> Before a writ in an action for libel is issued it must be indorsed with a statement giving sufficient particulars of the publications in respect of which the action is brought to enable them to be identified.

[7] Order 6 r. 2 RHC further states:

> (1) Before a writ is issued it must be indorsed:
>
> (a) with a statement of claim or, if the statement of claim is not indorsed on the writ, with a concise statement of the nature of the claim made or the relief or remedy required in the action begun thereby;

[8] A bit of history might help to throw some light on the need to indorse the writ in a defamation action with a statement giving sufficient particulars of the publication. I took a look at the precursor to the RHC 1980 which is the Rules of the Supreme Court 1957 (RSC) made under the Rule Committee Ordinance 1955.

[9] Under the RSC 1957 regime there was the General Form of Writ and the Specially Indorsed Writ. Order 2 r. 1 RSC 1957 provides:

> Every action in the High Court shall be commenced by a **writ of summons,** which shall be **indorsed with a statement of the nature of the claim made,** or of the relief or remedy required in the action, and which shall specify the place at which it is intended that the action shall be commenced. (emphasis added)

[10] Order 3 r. 1 SCR 1957 states that the indorsement of claim shall be made on every writ of summons before it is issued and shall be signed by the plaintiff or his solicitor.

[11] Order 3 r. 2 SCR 1957 further states that in the indorsement required by O. 2 r. 1, it shall not be essential to set forth the precise ground of the complaint, or the precise remedy or relief to which the plaintiff considers himself entitled.

[12] Order 3 r. 3 SCR 1957 then went on to say that the writ of summons shall be in Form 2 or Form 3. Form 2 is a General Form of Writ and Form 3 is a Specially Indorsed Writ.

[13] We then read further to find that there is O. 3 r. 6(1), (2) and O. 3 r. 9 RSC 1957 that specifically refer to a libel action. Order 3 r. 6(1) and (2) provides:

> (1) In any action other than one which includes:
>
> (a) a claim by the plaintiff for **libel, slander,** malicious prosecution, false imprisonment, seduction or breach of promise of marriage; or
>
> (b) a claim by the plaintiff based on an allegation of fraud,
>
> the **writ of summons** may, at the option of the plaintiff, be **specially indorsed with or accompanied by a statement of his claim.**
>
> (2) In any action to which para. (1) of this Rule applies a plaintiff who does not exercise his option to have his **writ specially indorsed with or accompanied by a statement of his claim** shall not be entitled to any greater costs than he would have been entitled to if he had exercised that option ... (emphasis added)

[14] Order 3 r. 9 RSC 1957 from which we get O. 78 r. 2 RHC 1980 reads:

> In actions for libel **the indorsement on the writ** shall state sufficient particulars to identify the publications in respect of which the action is brought. (emphasis added)

[15] In the current regime one does not make any distinction between a General Form of Writ (also referred to as a Generally Indorsed Writ) and a Specially Indorsed Writ. This is because of O. 6 r. 2(1)(a) RHC 1980 provides that before a writ is issued it must be indorsed with a statement of claim or, if the statement of claim is not indorsed on the writ, with a concise statement of the nature of the claim or the relief or the remedy required in the action begun thereby.

[16] Order 18 r. 1 RHC provides that unless a statement of claim is indorsed on the writ, the plaintiff must serve the statement of claim on the defendant when the writ is served or before the expiration of 14 days after the defendant enters an appearance. A

[17] There was an option for the plaintiff in a libel action to choose under the SCR 1957 between filing a writ specially indorsed with a statement of claim or accompanied by a statement of claim. I understand the word 'accompanied by' to mean 'together with as in following immediately after'. I do not think that such an option was deliberately designed to be taken away by O. 78 r. 2 RHC 1980. Under the scheme of the RHC 1980, most plaintiffs would be filing their writ and statement of claim together. The impugned words would be and in this case have been sufficiently set out in the statement of claim. Indeed the writ is said to be indorsed with the statement of claim filed and there is no prejudice caused to the defendant who can identify with sufficient particularization the publications. In fact in this case the defendant has no difficulty filing the defence and taking part fully in the plaintiff's application for an injunction by opposing it with several affidavits filed. B C D E

[18] It is different if the plaintiff were to file just a writ with no statement of claim accompanying it or not together with the statement of claim. Where a statement of claim is filed together with the writ there is little additional purpose to have the full particulars of the impugned publication reproduced again in the indorsement because the whole statement of claim is the indorsement. F

[19] At any rate the non-indorsement referred to is at most only an irregularity which can be rectified and the policy of allowing such an amendment to put in what is more in the character of a cosmetic conciseness and completeness cannot be validly challenged by the defendant who had continued with further steps in the proceeding by filing the defence. It was only after the plaintiff had filed in their application to amend on 12 November 2009 that the defendant filed in their application to strike out the plaintiff's claim on 22 December 2009. G H

[20] I must give effect to O. 2 r. 1 RHC where the policy under the whole scheme is to forgive non-compliance which is not of a deliberate or contumelious nature and which does not prejudice I

A the defendant in any way. Order 2 r. 1 RHC specifically addresses the issue of the effect of non-compliance and it is there to buffer the harsh realities of forgetfulness of deadlines (which we are all liable) and minor infraction not in the nature of an iniquity that would injure any one. Order 2 r. 1 RHC reads:

B

Order 2. Effect of Non-Compliance

Rule 1. Non-compliance with rules. (O. 2 r. 1)

(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any C proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken D in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3) the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure E occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

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(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.

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[21] The sting of the defendant's objection to the amendment has been very much removed by their conduct in taking fresh steps in the proceeding after realizing the irregularity if it is indeed an irregularity. Order 2 r. 2(1) RHC states that:

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An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

I

[22] It has also been argued by counsel for the defendant that the word 'shall' in O. 78 r. 2 RHC makes it mandatory and that the court would have no powers to extend the time frame prescribed in those provisions. I beg to differ. Take for example O. 32 r. 13(2)(b) RHC where it is provided clearly that:

> a party wishing to reply an affidavit served on him **must** file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him. (emphasis added)

[23] Surely that does not prevent parties from agreeing with one another for extension of time to file an affidavit with the court or if the other side is not agreeable to apply to court for leave to file and serve an affidavit out of time and giving the reasons for the late response.

[24] With much wisdom and discernment, his Lordship Peh Swee Chin J (as he then was) in *United Asian Bank Bhd v. Pushpamani Shanmugam* [1983] 2 CLJ 148; [1983] CLJ (Rep) 920 observed that there is a marked difference between the SCR 1957 and the RHC 1980 with respect to non-compliance with the rules:

> I exercised my discretion to allow the affidavit in question because the time of filing the affidavit did not appear to be anything more than an irregularity. *An irregularity pertaining to the non-compliance of rules of Court procedure and Court practice is curable. Even if it were such an irregularity as to amount to a nullity, in my view, it can still be cured or excused by the Court for the distinction between an irregularity and nullity, in regard to a failure to comply with the requirements of the Rules of the High Court 1980 and with it, the question of non-curability of a nullity has also gone overboard.* (emphasis added)

[25] We now have also O. 1A: RHC 1980 which reads:

> Court or Judge shall have regard to justice administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

[26] To that observation, must now be added the rider pronounced by the Federal Court in *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329 at p. 345 where the learned Chief Justice Zaki Tun Azmi cautioned:

A The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O. 1A RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. O. 1A RHC
B cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise, parties would be encouraged to ignore the Rules. Thus in this case, O. 1A RHC does not apply as the respondents had intentionally disregarded O. 6 r. 7(2A) RHC for their own reasons.

C **[27]** What is consistent in the scheme of curability of non-compliance is that the non-compliance must be that which is an accidental omission or oversight, an inadvertent infraction that does no injury to anyone. It does not come to aid the intentional or contumelious disregard of the Rules. It is like saving grace reaching
D out to forgive the penitent who comes with contrition and confession of his inadvertent omission but not the indolent or insolent.

[28] The plaintiff's counsel had been quick to admit that if it is
E an essential requirement the writ must be indorsed with a statement giving sufficient particulars of the publication though the writ had already been indorsed with a statement of claim containing the full details of the impugned paragraphs in the publication, then with all contrition they are imploring the saving
F grace of the court. The over-arching and overall consideration is the justice of the particular case and I cannot see how the defendant can be prejudiced by such an amendment.

Principles Governing Amendments Of Pleadings

G **[29]** The high watermark case of the Federal Court in *Yamaha Motor Co. Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428, in language both clear and concise said:

H The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result (a) whether the application is *bona fide* (b) whether prejudice caused to the other side can be compensated by costs and (c) whether the amendments would not in effect turn the suit from one character into a suit of another
I and inconsistent character.

[30] In *G.L.Baker Ltd v. Medway Building And Supplies Ltd* [1958] 1 WLR 1216 at p. 1231, the English Court of Appeal clarified as follows:

> … but there is no doubt what ever it is a guiding principle of cardinal importance on this question that, generally speaking, all such amendments ought to be made as may be "necessary for the purpose of determining the real question in controversy between the parties."

[31] The policy behind allowing an amendment to a pleading had been very well summed up in *Cropper v. Smith* [1883] 26 Ch. D 700 at p. 710 & 711 by Bowen LJ as follows:

> it is a well established principle that the object of the court is to decide the rights of the parties, and not to punish them for the mistakes they make in the conduct of their cases by deciding otherwise than accordance with their right … I know of no kind of error or mistake which, if not fraudulently or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party, Court do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace … it seems to me that as soon as it appears that the way which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, anything else is a matter of right.

[32] In our own local jurisprudence, reference can also be made to the following cases:

a. *Bumiputra-Commerce Bank Bhd & Ors v. Bumi Warna Indah Sdn Bhd* [2004] 4 CLJ 825 at p. 828;

b. *Dato' Tan Heng Chew v Tan Kim Hor & Ors* [2008] 7 CLJ 776 at p. 789;

c. *Skrine & Co v. MBf Capital Bhd & Anor & Other Appeals* [1998] 3 CLJ 432

[33] In *Kettemen & Ors v. Hansel Properties Ltd & Ors* [1987] 1 AC 189 at p. 212, Lord Brandon expressed the principles as follows:

A With regards to the principles on which his discretion to allow or refuse the application to amend should be exercise, the judge referred to the notes to RSC O. 20 r. 5 in the Supreme Court Practice 1982 and to the authorities there cited. The effect of these authorities can. I think, be summarized in the following four position. First of all such amendments should be made as B necessary to enable the real questions in controversy between the parties to be decided. Secondly the amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for C mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendments earlier, however late the application for leave to make such amendment may have been, the application should, in D general be allowed, provided that allowing it will not prejudice the other party. Fourthly, there is no injustice to the other party if he can be compensated by appropriate order as to costs.

[34] The latitude that the court should extend to the litigants is E captured in the case of *Muniandy Subrayan & Ors v. Chairman And Board Members, Koperasi Menara Maju Bhd* [1997] 1 CLJ 417 at p. 421 where Mahadev Shankar J (as he then was) stated as follows:

F With all due respect to the trial Judge, if he thought that it was imperative that the statement of claim should plead compliance (notwithstanding that the fact of compliance was already on record by way of agreed document), he should have directed that the claim be amended. Striking out pleadings under O. 18 r. 19 of the Rules of High Court 1980 is a discretionary power to be G exercised according to the justice of the case. The Supreme Court Practice is replete with judicial precedents to show that this was not a case for striking out and forensic courtesy should have persuaded Counsel for the defendant to inform the Judge that the point was a non-starter. All the more so as it had not been properly pleaded as a defence. H

[35] The stand of the courts with respect to amendments applied for is also expressed in *Kuala Lumpur Finance Berhad v. KGV & Associates Sdn Bhd* [1995] 1 CLJ 519 at p. 521, Shaik Daud J (as he then was) clarified as follows:

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it is also settled law that the mere fact that the case is weak and unlikely to succeed is no ground for striking out and also where the pleadings can be amended, leave under the rule to amend will almost always be given. In other words if there are defects in the pleadings resulting in the other party applying to strike out, and if an amendment can correct defect, the Courts generally would not act summarily.

[36] Further support of the above principle can be found in the case of *Watinah Mad Kartam v. Dr. KS Sarvananthar* [2009] 1 LNS 782; [2009] 9 MLJ 729 at p. 735 where Abdul Rahman Sebli JC clarified said:

[19] In any event it is trite law that an amendment of the pleadings should always be allowed provided:

(a) there is *bona fide* on the part of the applicant;

(b) they cause no prejudice to the other side which cannot be compensated with costs; and

(c) there are not such as to turn a suit of one character into a suit of another and inconsistent character.

[20] Thus although the application for amendment was made after striking out application was filed it does not bar the plaintiff from raising the issue of fraud. To accede to the defendant's argument would be to shut out the plaintiff's claim even before she could prove her case.

[37] The Court of Appeal in *Abdul Johari Abdul Rahman v. Lim How Chong & Ors* [1997] 1 CLJ 361 at p. 374, states the flexibility of the court in allowing amendments as follows:

The authorities strongly indicate that the Courts should lean in granting applications for amendments even when a new cause of action or line of defence is raised provided it is based on the same facts or arose out of the same transaction subject, however, to an award of costs to the other party for the injustice caused by the amendments.

[38] Yet another policy reason is given in *Shahidan Shafie v. Atlan Holdings Bhd & Anor & Other Appeals* [2005] 3 CLJ 793 at p. 808 where Gopal Sri Ram JCA (as he then was) said with characteristic clarity as follows:

A In the second place, we have said it often enough that we will not permit a litigant to suffer for the mistakes of his lawyers where to correct the error will not produce injustice to the other side. Now, this is a case where by permitting the plaintiff to amend his summons, the defendants will suffer no prejudice or harm that cannot be remedied by a suitable order as to costs. They will still have their day in court. And they might even succeed again. But consider for a moment the plaintiff's position. He will forever be shut out from his chance at receiving justice. Therefore weighing these two opposing factors on a balance I find the tilt to be in the plaintiff's favour. The suggestion that the court is here rushing to the assistance of the plaintiff is completely misconceived. All that we are doing is meting out justice according to the substantial merits of the case without regard to technicalities. And that, I think, is why we exist as a constitutional institution.

[39] The defendant's counsel had referred me to the following cases in opposing the plaintiff's application to amend by inserting a summary of the impugned publications in the writ of summons eventhough the indorsement in the statement of claim filed and served with the writ contains the full details:

Wong Ah Hee @ Wong Ah Mooi & Anor. v. Low Tuck Hoong [1994] 2 CLJ 313;

Dato' Tan Heng Chew v. Tan Kim Hor & Ors [2008] 7 CLJ 776;

Wan Daud bin Wan Jusoh v. Mohamed bin Haji Ali & Anor; Daud bin Jusoh v. Annuar bin Haji Musa & Anor; Mohd Nor bin Ismail v. Mohd Zain bin Abdullah & Anor [1988] 2 MLJ 384;

Dato' Tan Heng Chew v. Tan Kim Hor & Ors [2008] 7 CLJ 776;

Tetuan Tanjung Teras & Ors v. Tetuan Syn Tai Hung Trading Sdn Bhd [2003] 7 CLJ 124.

[40] While I have no difficulty in agreeing with the principles propounded I cannot see how the amendments applied for would prejudice the defendant in any way or that it had not been made *bona fide*.

Whether *Res Judicata* Can Be Invoked To Disallow The Amendment?

[41] The test to be applied in deciding whether *res judicata* can be raised to bar a present application based on a past application is found in the clear exposition of Gopal Sri Ram JCA (as he then was) in *Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd* [2008] 6 CLJ 31, at pp. 37-38:

> Learned counsel for the plaintiff drew our attention to certain passages in the judgment of Siti Norma Yaakob JCA in which the merits of the case appear to have been discussed. The comments in these passages are mere *obiter dicta* and do not constitute the *ratio* of the case. *It is only the ratio of the case which is binding between the parties to a dispute or their successors* … Further, to constitute *res judicata*, "the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1964] MLJ 49 at p. 53, *'necessarily and with precision' determine the point in issue" … These issues were not at stake before this court in the earlier proceedings. It is therefore our judgment that the plea of res judicata cannot succeed.* (emphasis added)

Further explanation of this principle is found in *Koperasi Belia Nasional Bhd v. Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 CLJ 335, at p. 337-338, where the Court of Appeal clarified as follows:

> Nothing could be clearer than that Richard Talalla J made no adjudication on the point that the application to set aside Siti Norma Yaacob J's judgment was served out of time. All that Richard Talalla J found was that the judgment of Siti Norma Yaakob J that was served on the defendant has to be a sealed copy. In fact, it was a sealed copy of the judgment that the defendant received from the plaintiff on 3 February 1994. The judge did not make any adjudication on the point under O. 42 r. 13 which was that the defendant's application to set aside the judgment was served on the plaintiff more than thirty days after the defendant had received the sealed judgment of Siti Norma Yaakob J. **When the Judge in the earlier proceedings made no adjudication, the plea of *res judicata* must fail.** (emphasis added)

The same approach and attitude is taken by the Court of Appeal in *The Pacific Bank Bhd v. Chan Peng Leong* [1998] 2 CLJ 440, at p. 448:

> In my judgment, it is of the essence, in cases of this nature, when the plea of *res judicata* is taken, **to identify with precision the issue that was decided in the earlier proceedings,** which it is contended operates as a bar to relitigation because to constitute a *res judicata*, the earlier judgment must, necessarily and with precision determine the point in issue. (emphasis added)

[42] While the principles propounded were in the context of a previous and past proceeding *vis-à-vis* a present proceeding, the same principle is applied to a previous and past application and a present application. One application is for an injunction and the current one is for an amendment of the writ.

[43] They are poles apart and the considerations are also different. Whilst a judge hearing an application may say in passing why the plaintiff's injunction is not granted as perhaps that the words are on the face of it not defamatory or that the writ here without the statement as stipulated in O. 78 r. 2 is defective, these are merely *obiter* remarks and not the *ratio* of the case. Neither are they findings that must be particularly and peculiarly decided with precision for a determination of the application for an injunction. Little wonder that a judge in hearing an application for an injunction cannot on his own strike out a plaintiff's claim merely because he thinks the writ is defective or that the plaintiff has no cause of action. These are not matters that have particularly and peculiarly proceeded for precise pronouncement by the court. Anything said in the process that does not come within that parameter is said only by way of passing and it would not prejudice a party from putting in an application that now calls for a full and focused finding and determination.

Pronouncement

[44] In the upshot I am constrained to allow this application by the plaintiff for amendment which would not prejudice the defendant in any way. Having held that the whole statement of claim is also the statement of the nature of the claim that is to be stated in the writ I had allowed the appeal with costs in the cause.